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United Nations

Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996

Thirteenth session
(29 June to 2 July 2009)

General Assembly
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Sixty-fourth Session
Supplement No. 37

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Chapter I

Introduction

1. The thirteenth session of the Ad Hoc Committee established by the General Assembly in its resolution 51/210 of 17 December 1996 was convened in accordance with paragraph 23 of General Assembly resolution 63/129. The Committee met at Headquarters from 29 June to 2 July 2009.

2. In accordance with paragraph 9 of General Assembly resolution 51/210, the Ad Hoc Committee was open to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency.

3. At its 42nd meeting, on 29 June 2009, the Committee decided that the members of the Bureau of the Committee at the previous session would continue to serve in their respective capacities. However, as some members were no longer available to serve in their respective capacities, the Committee elected new members. The Bureau was thus constituted as follows:

Chairman:

Rohan Perera (Sri Lanka)

Vice-Chairpersons:

Maria Telalian (Greece)
Ana Cristina Rodriguez-Pineda (Guatemala)
Namira Nabil Negm (Egypt)

Rapporteur:

Andi Xhoi (Albania)

4. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Ad Hoc Committee, assisted by George Korontzis as Deputy Secretary. The Codification Division of the Office of Legal Affairs provided the substantive services for the Committee.

5. At the same meeting, the Ad Hoc Committee adopted the following agenda (A/AC.252/L.18):

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Organization of work.
5. Consideration of the questions contained in the mandate of the Ad Hoc Committee as set out in paragraph 22 of General Assembly resolution 63/129 of 11 December 2008.
6. Adoption of the report.

6. The Ad Hoc Committee had before it the report on its twelfth session.[1] It also had before it the report on its sixth session,[2] containing, inter alia, a discussion paper prepared by the Bureau on the preamble and article 1 of the draft comprehensive convention on international terrorism; informal texts of articles 2 and 2 bis, prepared by the coordinator; the texts of articles 3 to 17 bis and 20 to 27 prepared by the Friends of the Chairman; texts relating to article 18, one circulated by the coordinator for discussion and the other proposed by the States members of the Organization of the Islamic Conference; a list of proposals made during the informal consultations on the preamble and article 1 appended to the report of the coordinator on the results of the informal consultations in the Ad Hoc Committee; and two letters of 2005 from the Permanent Representative of Egypt to the United Nations concerning the convening of a high-level special session of the General Assembly on cooperation against terrorism.[3]

[1] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 37* (A/63/37).

[2] Ibid., *Fifty-seventh Session, Supplement No. 37* (A/57/37 and Corr.1). See also the reports of the Ad Hoc Committee on its seventh to tenth sessions (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 37* (A/58/37); ibid., *Fifty-ninth Session, Supplement No. 37* (A/59/37); ibid., *Sixtieth Session, Supplement No. 37* (A/60/37); and ibid., *Sixty-first Session, Supplement No. 37* (A/61/37)). See also the reports of the Working Group established at the fifty-fifth to sixtieth sessions of the General Assembly (A/C.6/55/L.2, A/C.6/56/L.9, A/C.6/57/L.9, A/C.6/58/L.10, A/C.6/59/L.10 and A/C.6/60/L.6). The summaries of the oral reports of the Chairman of the Working Group established at the sixty-first, sixty-second and sixty-third sessions are contained in documents A/C.6/61/SR.21, A/C.6/62/SR.16 and A/C.6/63/SR.14, respectively.

[3] Letters dated 1 and 30 September 2005 from the Permanent Representative of Egypt to the United Nations addressed to the Secretary-General and the Chairman of the Sixth Committee, respectively (A/60/329 and A/C.6/60/2).

Chapter II
Proceedings

7. The Ad Hoc Committee held two plenary meetings: the 42nd on 29 June and the 43rd on 2 July 2009.

8. At the 42nd meeting, a moment of silence was observed in memory of Mr. Lublin Dilja, its Rapporteur from 2003 until 2008, who passed away in February 2009. The Ad Hoc Committee also expressed its appreciation to Diego Malpede (Argentina), and Sabelo Sivuyile Maqungo (South Africa), who were no longer available to serve as Vice-Chairpersons and the late Lublin Dilja for their valuable contribution to its work. The Ad Hoc Committee also adopted its work programme and decided to proceed with discussions in informal consultations and informal contacts. At the same meeting, the Committee held a general exchange of views on the draft comprehensive convention and on the question of convening a high-level conference. An informal summary of those discussions, prepared by the Chairman, appears in annex I to the present report. The informal summary is intended for reference purposes only and not as a record of the discussions.

9. The informal consultations regarding the draft comprehensive convention on international terrorism were held on 29 June and informal contacts were held on 29 and 30 June. On 29 June and on 2 July, the Coordinator of the draft convention, Maria Telalian (Greece), made statements briefing delegations on the informal contacts held intersessionally on 23 June 2009 and during the current session, respectively. A summary of those reports appears in annex II to the present report, for reference purposes only and not as a record of discussions.

10. The informal consultations concerning the question of convening a high-level conference under the auspices of the United Nations to formulate a joint organized response of the international community to terrorism in all its forms and manifestations were held on 30 June. An informal summary of those discussions, prepared by the Chairman, appears in annex I to the present report. The informal summary is intended for reference purposes only and not as a record of the discussions.

11. At the same meeting, the Ad Hoc Committee adopted the report on its thirteenth session.

Chapter III
Recommendation

12. At its 43rd meeting, the Ad Hoc Committee decided to recommend that the Sixth Committee, at the sixty-fourth session of the General Assembly, establish a working group with a view to finalizing the draft comprehensive convention on international terrorism and continue to discuss the item included in its agenda by General Assembly resolution 54/110 concerning the question of convening a high-level conference under the auspices of the United Nations.

Annex I

Informal summary prepared by the Chairman on the exchange of views in plenary meeting and on the results of the informal consultations

A. General

1. During the general exchange of views at the 42nd meeting of the Ad Hoc Committee, on 29 June 2009, delegations reaffirmed their strong condemnation of terrorism in all its forms and manifestations, which can never be justified under any circumstances. They also recalled that the scourge of terrorism was one of the main threats to international peace and security, as well as a factor of destabilization of societies at the national level. Delegations stressed the necessity for the international community to coordinate its actions to combat terrorism at the regional and international levels, and to further demonstrate its firm determination to eradicate this global menace. Some delegations cautioned against the use of double standards in countering terrorism, while the point was also made that "State terrorism" was an abhorrent form of terrorism. A number of delegations stressed that any counter-terrorism measures should be in conformity with the Charter of the United Nations and international law, in particular human rights, refugee and humanitarian law. Delegations observed that terrorism should not be associated with any culture, religion, race, ethnic or national group, and that dialogue among civilizations and religions should be encouraged. Some delegations also recalled the necessity of addressing the conditions conducive to terrorism.

2. Furthermore, the central role of the United Nations in the formulation of the international legal framework to combat terrorism was highlighted, as well as the need to strengthen this framework through a wider participation of States in the various conventions. Some delegations gave examples of steps that they have taken at the national and regional levels in combating international terrorism. While support was expressed for the United Nations Global Counter-Terrorism Strategy and its first review in September 2008, some delegations pointed out that the strategy constituted a living document that should be updated and examined regularly. The point was also made that victims of terrorism were often forgotten in the fight against terrorism and, thus, the first International Symposium on Supporting Victims of Terrorism, organized by the United Nations in September 2008, was particularly welcomed. It was also suggested to include the question of victims of terrorism in the text of the draft convention. Some delegations expressed their support for the proposal of Tunisia to establish a global code of conduct in the fight against terrorism, as well as for the proposal of Saudi Arabia to establish an international centre to combat international terrorism, under the auspices of the United Nations.

B. Draft comprehensive convention on international terrorism

3. During the general exchange of views at the 42nd meeting and informal consultations on 29 June 2009, delegations reiterated the importance of an early conclusion to the draft comprehensive convention on international terrorism. It was mentioned that time was propitious to reach a solution reflecting the common

expectations and interests of all delegations and that the momentum had to be seized. It was further mentioned that the adoption of a comprehensive convention would strengthen the moral authority of the United Nations. As calls for constructive dialogue were made, some delegations stressed that every effort should be made to reach agreement by consensus.

4. While some delegations highlighted the law enforcement character of the instrument, several delegations expressed the view that the draft convention would complete and strengthen the current legal regime by creating an effective additional tool and fostering coordination among States in the struggle against terrorism. It was also mentioned that a comprehensive convention would provide a legal framework that would supplement the existing conventions dealing with terrorism.

5. With regard to the outstanding issues surrounding the draft convention, several delegations underlined that the deliberations should focus on the scope of application of the convention, notably on draft article 18. Thus, while remaining open and appreciating efforts at reaching a consensus text, some delegations reiterated a preference for the proposal circulated in 2002 by the former Coordinator of the Convention, while other delegations preferred the text proposed the same year by the Organization of the Islamic Conference. Some delegations expressed their willingness to work on the basis of the Coordinator's package proposal of 2007, or any other proposals that may be put on the table to bridge the gap. The point was made that the substance and integrity of international humanitarian law preserved in the 2007 proposal by the Coordinator was an important frame of reference for discussion and could be the basis on which a consensus could be generated.

6. Several delegations also emphasized the need for the comprehensive convention to include a clear legal definition of terrorism. In this regard, some delegations pointed out the necessity to distinguish between acts of terrorism and the legitimate struggle of people in the exercise of their right to self-determination by people under foreign occupation and colonial or alien domination. Some other delegations underlined that no cause can justify terrorism, and it was further stated that the comprehensive convention should not exclude criminal acts on the basis of self-determination. The inclusion of the notion of "State terrorism" was also raised out by some delegations. It was further suggested that the convention should include activities of armed forces (see A/60/37, annex III). Finally, the possibility of removing the word "comprehensive" from the title of the convention to attenuate some of the concerns was discussed as a possible element in reaching a compromise.

7. At the 43rd meeting, on 2 July 2009, following the statement of the Coordinator on the results of the bilateral contacts and informal meetings concerning outstanding issues during the current session (see annex II, sect. B, to the present report), delegations reiterated their support for the adoption of the draft convention, which would strengthen the existing international counter-terrorism legal framework.

8. Delegations affirmed their commitment to remaining engaged in the negotiating process and to reaching agreement on the draft convention by consensus, emphasizing that every effort should be made to resolve the outstanding issues. Some delegations stressed that no cause or grievance justified terrorism in any form; the essential character of the draft convention as an international criminal law instrument, as well as the need to ensure that it should not change existing obligations of States under international humanitarian law or create new ones. While

reiterating preferred positions, delegations expressed their readiness to consider the 2007 package proposal of the Coordinator, with some noting that it was a sound basis for reaching a consensus and any possible consideration of previous proposals would represent a step backwards in the negotiations.

9. Several delegations identified the sixty-fourth session of the General Assembly as a timely opportunity to conclude negotiations on the text within the framework of the Working Group of the Sixth Committee. In this connection, some delegations appealed for a spirit of compromise on the outstanding issues to be demonstrated among delegations in order to achieve a positive result, while others recognized the need for advance preparation, including the possible submission of working papers. A suggestion was also made that any of the issues that might not be resolved could be subject of future consideration.

C. Question of convening a high-level conference

10. During the informal consultations held on 30 June 2009, the sponsor delegation of Egypt recalled the importance of holding a high-level conference, a proposal endorsed by the Movement of the Non-Aligned Countries, the Organization of the Islamic Conference, the African Union and the League of Arab States, to consider the question of terrorism in all its aspects, especially its definition and any link to education, human rights and the rule of law. It was stated that, as a multidimensional phenomenon, terrorism had to be analysed in all its aspects, especially the economic and social conditions that might be conducive to it, in order to successfully eliminate it. While underscoring that the holding of the conference should not be tied to the conclusion of the comprehensive convention, it was stressed that such a conference could assist the process, as it would contribute to fleshing out and resolving the outstanding issues involved in its negotiation.

11. During the 42nd and 43rd meetings, on 29 June and 2 July 2009, as well as during the informal consultations held on 30 June 2009, several delegations expressed their support for the proposal made by Egypt, as it would demonstrate the strong determination of the international community to establish a joint organized response to terrorism in all its forms and manifestations, and shared the views expressed by the sponsor delegation. On the other hand, several other delegations, while supporting the convening of the conference in principle, questioned its timing. Some reiterated their view that the conference should be convened only after an agreement on the comprehensive convention on international terrorism had been reached, while others were flexible. It was underlined that the conference would offer an opportunity to explore ways to better implement the convention just adopted. The point was also made that being a high-level conference, topics discussed would have to be general, and issues such as the definition of terrorism for the purposes of a criminal law enforcement instrument would not fall within the format of such a conference.

Annex II

Reports on the informal contacts on the draft comprehensive convention on international terrorism

A. Summary of the briefing on the results of intersessional informal contacts

1. In her briefing on 29 June concerning the informal intersessional contacts, the Coordinator of the draft comprehensive convention on international terrorism, stated that a round of bilateral contacts was convened on 23 June 2009 and a series of other informal contacts with delegations were held thereafter during the rest of the week ending 27 June. The purpose of the consultations was to re-engage delegations on matters relating to the draft comprehensive convention, and to afford an opportunity for a better appreciation of positions of delegations in the light of the elements of a possible package presented in 2007 (see A/62/37).

2. The Coordinator recalled that the rationale for the elements of the package proposal and its background context were explained when it was introduced in 2007 (see A/62/37). Further clarifications thereof were also made thereafter (see in particular A/C.6/62/SR.16, A/63/37 and A/C.6/63/SR.14).

3. In her report, the Coordinator expressed her appreciation for the efforts made by delegations who made time during the bilateral contacts to consult with her and share their hopes and concerns, noting that the continuing efforts to find a solution to the outstanding issues were a shared quest. She noted that in her contacts there was interest among some delegations to begin to project periods within which the current process should be concluded. Such guarded optimism took into account, in particular, the fact that, in 2009, discussions on the outstanding issues had been ongoing for nine years and, more important, that the approach taken thus far had been to build upon proposals that in the past had been the basis of concrete outcomes.

4. At the same time, she noted that there seemed to be a recognition among delegations that the negotiations had reached a state of inertia and that there was need for a momentum of goodwill and a sense to seize the moment in order to move the process forward. There was a tendency to hold on to previously held positions while signalling a willingness to remain engaged, with delegations reiterating the importance that they attached to the early conclusion of the draft convention. There was also a tendency to read specific situations, events and circumstances into the proposed text. While she saw this as a natural inclination for lawyers, she cautioned against such a mindset when involved in a legislative exercise, where the essential role was to project principles.

5. In this connection, the Coordinator recalled some aspects intended to distil such principles and points of convergence, which she had echoed in previous interventions. Such legal principles sought in particular to assure the continuing application of existing law, operating alongside the principles that the draft convention sought to elaborate:

(a) The draft convention was designed to serve as a law enforcement instrument. Accordingly, the need to preserve its acquis as an instrument for ensuring individual criminal responsibility on the basis of an extradite or prosecute

regime had been stressed. Such an approach was followed in the other multilateral counter-terrorism instruments, including those adopted by the Ad Hoc Committee in recent years;

(b) The draft convention was not intended to apply in isolation of other rules of international law, but rather as an additional building block in an already existing legal framework that governed the conduct of relations among States. Indeed, the draft convention contained specific obligations of cooperation between States in the prevention and suppression of terrorist activities taking place in their own territories, in particular in draft article 8. Such obligations codified in an elaborate manner and built relevant provisions contained in existing anti-terrorism conventions; and the results achieved were reminiscent of the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV));

(c) In carving out a niche for the scope of application of the draft convention the negotiating process had not been oblivious to the fact that the draft convention would operate in the context of other existing legal regimes, in particular the law under the Charter of the United Nations, international humanitarian law, and international and national "security law", which, inter alia, separated, when administering justice, in practically all jurisdictions, the activities of the civil administration from those of the military. Accordingly, an attempt had been made to establish a demarcation between what was covered by the draft convention, on the one hand, and what was safeguarded and not prejudiced, on the other. In particular, activities of armed forces of a State during armed conflict, as those terms were understood under international humanitarian law, were governed by that law. The overarching objective of such exclusion was to ensure that the sanctity of international humanitarian law, together with developments thereof, was not to be prejudiced by the draft convention. Equally essential had been the recognition that the draft convention was not intended to impose international humanitarian standards on States that would become parties to it, if they were not bound by such standards, nor was it intended to supersede such obligations where they already existed;

Moreover, an attempt had been made to ensure that the exclusionary elements safeguarded, as far as possible, the application of such other law, by, for instance, not rendering unlawful otherwise lawful acts under such law, while also seeking to close any loopholes that might open possibilities for impunity for certain categories of persons. The key consideration was the principle that no impunity was intended in respect of military forces of a State that might commit offences that may be similar to the ones which the convention proscribed, as such members would be prosecuted under other applicable laws;

(d) The approach that had exclusionary clauses was not without precedent. Negotiations leading to the adoption of several counter-terrorism instruments, including the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of Acts of Nuclear Terrorism had wrestled with similar concerns and had resolved such concerns successfully. While it was understandable that the reference to "comprehensive convention" might have heightened certain expectations, there ought to be a certain satisfaction in the fact that the negotiations had come a long way to have a definitional article

for individual criminal responsibility like that contained in draft article 2. It was recalled that some suggestions had been made to give a different title to the draft convention, which might assist to lower expectations hitherto associated with the word "comprehensive". The Coordinator observed that as the process moved forward that was an idea that would require serious consideration;

(e) The need to have exclusions was not without factual or legal significance. Without such exclusions, the draft convention would make unlawful conduct that otherwise was not prohibited in a variety of circumstances. Thus, if, for instance, death were to occur as it did in a situation of armed conflict in circumstances that would intimidate a population, such factual situation would conceivably fall within conduct that the draft convention sought to proscribe. Such factual situation would in turn imply that, legally, by concluding the draft convention some well-settled rules would have unwittingly been implicated or modified when the current negotiating framework was not the appropriate forum to address such issues. The Coordinator cautioned that by elaborating the "New York law" on combating international terrorism the "Geneva law" of armed conflict should not be altered;

Instead of reflecting the possible exclusions as part of the draft article that proscribed particular conduct as in draft article 2, the negotiating process considered it appropriate, after long drawn negotiations, to reflect such exclusions in the form of "without prejudice" and "applicable law" clauses, as draft article 18 now sought to do. Such an approach was intended to make the circumscription more complete and legally consonant. Excluding the activities of armed forces during an armed conflict from the scope of application of the comprehensive convention did not grant them impunity. For instance, a range of violations of international humanitarian law are punishable under that law and must be prosecuted by all States. Indeed, international criminal law had made some proscriptions subject of international criminal jurisdiction. Effectively, the exclusions preserved what already existed without in any way prejudicing or prejudging their application when a set of factual circumstances necessitated the application of another law. By elaborating the draft convention, the negotiating process was only adding an extra tool in an existing legal toolbox available to States to use when dealing with acts of violence and criminality.

6. The Coordinator reiterated that she had no doubt in her mind that the negotiations were on the right track. In the light of the precedents that had been followed, the approach taken was beyond legal reproach. However, it was imperative to garner the necessary political will.

B. Summary of the briefing on the results of informal contacts during the current session

7. In her briefing on 2 July on the bilateral and informal contacts with delegations held during the current session, the Coordinator of the draft comprehensive convention noted that further bilateral contacts with delegations had been convened on 29 and 30 June. Moreover, informal contacts had been held with delegations either bilaterally or in groups at diverse places at the United Nations Headquarters.

8. The Coordinator reported that since the bilateral and informal contacts had been held against the background of the general exchange of views and informal consultations on 29 June, delegations had taken the opportunity to make an assessment of that debate, in light of statements made by delegations. While some delegations were apprehensive about the tone and wondered whether positions had changed, others viewed the debate as a restatement of well known previously held positions. The Coordinator noted that she had assured delegations of the need to retain an optimistic disposition, and that she did not see the debate on 29 June as a regressive step. Such a position was vindicated as the Chairman of the Ad Hoc Committee and the Coordinator met with more and more delegations during the bilateral and informal contacts; these delegations reiterated their willingness to remain engaged in the process. Some delegations assured the Coordinator that the package proposal made in 2007 was still under active consideration, noting also that although different language was used in the debate as compared to previous years' statements, there was no intention to change or signal a change of positions, but simply a reiteration of preferred positions; there was also no desire to revert to the pre-2007 position.

9. To provide the necessary space for the negotiations and assist delegations in their future work, the Coordinator underscored several considerations, which she noted she had also recounted, in one way or another, to delegations in the bilateral contacts:

(a) The package proposal in 2007 was presented following intensive consultations with delegations, and was aimed at overcoming the impasse that had been reached. As had been the practice of the Ad Hoc Committee and the Working Group of the Sixth Committee, all proposals made by delegations remained on the table until such time that general agreement was eventually reached;

(b) The elements of the package as proposed in 2007 were part of an overall package; they had to be appreciated and understood against the background of the other provisions of the draft convention, in particular, draft article 2 of the draft comprehensive convention prepared by the Coordinator, and draft articles 3, 14, 15, 20 and 22, prepared by the Friends of the Chairman (A/57/37, annexes II and III, respectively);

(c) Any attempt to slice the elements would result in affecting the overall balance that ought to be achieved. It was neither in the spirit of the proposal nor in the underlying motivation that the elements would be open to delegations to pick and choose which parts they found favourable and to discard those they disliked;

(d) The interpretation and application of the convention were the primary responsibility of the parties to the convention. It was part of the functioning of law in society and a common occurrence in legal argumentation that words or terms which might appear vague, obscure and indeterminate had their own dynamic and assumed concreteness, clarity and determinacy in specific fact situations once relevant authorities assumed their roles of interpretation and application.

10. The Coordinator expressed the hope that these additional clarifications would assist delegations as they sought to further reflect upon the elements in the light of decisions that ought to be made and were necessary to complete work of the draft convention. She noted that several delegations had reiterated their wish to use the opportunity of the sixty-fourth session of the General Assembly in the fall to

achieve a concrete outcome, in the context of the work of the Sixth Committee. This was a goal that the Coordinator shared and she expressed the hope that delegations, working together, would achieve such a positive result. In this connection, she urged delegations to continue to be engaged as the process moved forward, noting that, in order to realize the kind of result that was anticipated in the fall, the period between the conclusion of the session of the Ad Hoc Committee and the convening of the Assembly was key.

11. The Coordinator thanked all delegations for their assistance and cooperation, noting that their willingness to talk and offer ideas had been a source of inspiration and satisfaction.

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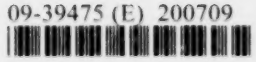

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